

# THE CORPORATION JOURNAL

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THE CORPORATION TRUST COMPANY AND ASSOCIATED COMPANIES

*In the incorporation, qualification and statutory representation of corporations, The Corporation Trust Company, C T Corporation System and associated companies deal with and act for lawyers exclusively.*

Bill 250, Laws of Nebraska, 1941, which became effective August 22, 1941, enacted a General Corporation Law applicable to the organization of corporations organized after that date and to the regulation of all Nebraska stock corporations.

The Court of Appeals of New York has held that a corporation may not, as an incident to an amendment of its certificate of incorporation, eliminate preferential rights of preferred stockholders to accrued dividends, and to deprive them, without their consent, of their rights in a cumulative sinking fund for the redemption of their shares. (Page 7.)

The Supreme Court of Arkansas has held that a foreign corporation, operating in the state under a contract with the Federal Government, was liable for a penalty for failure to obtain authority to do business in the state. (Page 10.)



President.

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The Corporation Journal is published by The Corporation Trust Company, monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost (\$1.50).

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## New York's New Statute on Preemptive Rights

Chapter 691, Laws of 1931, added a new section, Section 39, to the New York Stock Corporation Law, effective September 1, 1941. This section is headed "Preemptive Rights," and its provisions are the most comprehensive governing preemptive rights to be found in the corporation laws of any state.

This statute represents New York's first legislative expression on the subject. Prior to its enactment, there had, however, been a number of decisions of the New York courts in recent years relating to the subject.<sup>1</sup>

The new law defines the extent of these rights. It divides them into two classes, one class being based on dividend rights and the other being based on voting rights and indicates they may be affected by the provisions of the certificate of incorporation or other certificates filed pursuant to law.<sup>2</sup> It is stipulated also that, unless otherwise provided in such certificates, preemptive rights will not arise relative to shares or other securities offered for sale in connection with

certain (1) mergers and consolidations, (2) conversions or option rights, (3) issued securities reacquired, (4) originally authorized shares, issued, sold or optioned within two years from the date of filing the certificate of incorporation, or (5) plans of reorganization approved under the Federal Bankruptcy law.

Other outstanding features of section 39 are an outlining of how stockholders entitled to preemptive rights are to be determined, how proportionate rights are to be fixed and how notices are to be mailed to stockholders.<sup>3</sup> Provision is also made for the disposition of shares or securities where preemptive rights are not exercised.<sup>4</sup> The act also provides that "neither the enactment of section thirty-nine of the stock corporation law as added by this Act, nor anything therein contained shall be construed as implying that if such section had not been enacted the proceedings therein authorized could not have been taken."<sup>5</sup>

<sup>1</sup> *Hoyt v. Great American Insurance Co.*, (1922) 194 N. Y. S. 449; *Dunlay v. Avenue M Garage & Repair Co., Inc. et al.*, (1930) 253 N. Y. 274, 170 N. E. 917; *Danzig v. Lacks et al.*, (1932) 256 N. Y. S. 769; *Hammer v. Werner et al.*, (1933) 265 N. Y. S. 172; *Albrecht, Maguire & Co., Inc. v. General Plastics, Inc. et al.*, 9 N. Y. S. 2d 415, (1939), affirmed, without opinion, 280 N. Y. 840, 21 N. E. 2d 887.

<sup>2</sup> Subsections 2, 3 and 4.

<sup>3</sup> Subsections 5 and 6.

<sup>4</sup> Subsection 7.

<sup>5</sup> Section 2.

## Domestic Corporations

### Delaware.

The Supreme Court of the United States rules that in diversity of citizenship cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. In an action instituted in a Federal court in Delaware, in which jurisdiction rested on diversity of citizenship, the plaintiff being a New York corporation and the defendant a Delaware corporation, involving a contract executed in New York, the Supreme Court of the United States opened its opinion as follows: "The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. We left this open in *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 208, n. 2. The frequent recurrence of the problem, as well as the conflict of approach to the problem between the Third Circuit's opinion here and that of the First Circuit in *Sampson v. Channell*, 110 F. (2d) 754, 759-62, led us to grant certiorari." A jury verdict of \$100,000 had been recovered and the Circuit Court of Appeals, Third Circuit, had affirmed the District Court in its view that interest was to be added under the provisions of Section 480 of the New York Civil Practice Act, as the rights of the parties were governed by New York law. Certiorari was granted, limited to the question whether the section mentioned was applicable to an action in the federal court in Delaware. Referring to the opinion of the Circuit Court of Appeals, the Supreme Court said: "Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed. We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins*, 304 U. S. 64, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts." The judgment was reversed and the case remanded to the Circuit Court of Appeals for decision in conformity with the laws of Delaware. *Klaxon Company v. Stentor Electric Manufacturing Company, Inc.*, 61 S. Ct. 1020. Commerce Clearing House Court Decisions Requisition No. 260930. John Thomas Smith of New York City and James D. Carpenter, Jr., of Jersey City, N. J., for petitioner. Murray C. Bernays of New York City, for respondent.

**Amendment, adopted by majority vote of Class A stock, voted as a class, and preferred and common stock, voted together, upheld, majority vote of common stock, voting as a separate class, not being required.** Complainant, the owner of approximately 69% of the outstanding no par value common stock of the defendant company, which also had no par value preferred stock and \$1 par Class A stock outstanding, sought to have declared invalid, because illegally adopted, an amendment adopted at a stockholders' meeting, the effect of which would have been to increase the authorized Class A shares from

500,000 to 1,000,000. The vote on the amendment had been taken by the Class A stockholders voting as one class, and by the preferred and common stockholders, voting together. Pursuant to the provisions of the certificate of incorporation, preferred and common stockholders had equal voting rights. The common stock was to receive no dividends until the preferred stock had received \$1 per share for two consecutive years and until the Class A stock had been retired. An agent of complainant had attended the meeting and demanded that the common stock be voted separately on the proposed amendment. As the vote was taken, more than a majority of the shares of the two groups favored the amendment. It appeared, however, that the amendment did not receive a majority vote of the common stock outstanding. The Court of Chancery, New Castle County, in passing upon the validity of the adoption of the amendment examined both the language of defendant's charter and the pertinent provisions of the General Corporation Law, and concluded that, in this instance, "the question involved is clearly one of contract rights, and, under a fair and reasonable construction of the defendant's charter, including the provisions of Section 26, it seems difficult to escape the conclusion that that vote was sufficient and that the affirmative vote of a majority of the common stock, voting as a separate class, was not required." *Hartford Accident & Indemnity Company v. W. S. Dickey Clay Manufacturing Company*, 21 A. 2d 178. Commerce Clearing House Court Decisions Requisition No. 264294. Stewart Lynch, of Wilmington, for complainant. William S. Potter of Southerland, Berl, Potter & Leahy, of Wilmington, for defendant.

### Maryland.

Corporation, whose charter was forfeited for non-payment of taxes, held unable as a corporation to enforce rights acquired prior to forfeiture. In *Atlantic Mill & Lumber Realty Co., Inc. et al. v. Keefer et al.*,\* 20 A. 2d 178, the Court of Appeals of Maryland ruled that a Maryland corporation, whose charter had been forfeited for non-payment of franchise taxes, was without power to file a mechanics' lien as a corporation, since it was not in existence and had no authority to enforce rights acquired during the life of its charter and therefore could not function as a corporation. Frederick H. Henninghausen (Charles F. Stein, Jr., on the brief), of Baltimore, for appellants. Louis J. Jira (John S. Mahle, on the brief), of Baltimore, for appellees.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Maryland, page 707.

### New York.

Court of Appeals rules corporation may not, as an incident to an amendment, eliminate preferential rights of preferred stockholders to accrued dividends, without their consent. In *Davison et al. v. Parke, Austin & Lipscomb, Inc., et al.*, 119 N. Y. S. 2d 117, (The Corporation Journal, November, 1940, page 249), the Supreme Court, Special Term,

New York County, ruled that a change of shares of one class into shares of another class, following a readjustment of capital stock, did not constitute a "reclassification" under Sec. 36, Stock Corporation Law. Upon appeal, the Court of Appeals of New York has reversed the judgment in that case, ruling there was a reclassification. "The question," said the court, "is whether the present statute, which was in effect when the preferred shares held by plaintiffs were issued, permits a corporation, as an incident to an amendment of its certificate of incorporation, to eliminate preferential rights of preferred stockholders to dividends which have accrued, and to deprive them without their consent of their rights in a cumulative sinking fund for the redemption of their shares." The court said it seemed conclusive that no such power was intended to be conferred by the Legislature, since it failed expressly to provide that these rights might be taken away. A new trial was ordered. *Davison et al. v. Parke, Austin & Lipscomb, Inc., et al.*, 285 N. Y. 500, 35 N. E. 2d 618. Commerce Clearing House Court Decisions Requisition No. 264062. Frank C. Mebane, Jr., of New York City, for appellants. Louis P. Eisner, of New York City, for respondents.

**Stock appraisal denied where plan providing for optional exchange did not alter existing preferences between common and preferred stock.** The petitioner, a preferred stockholder in the respondent company, applied to have appraisers appointed to appraise the value of his stock under Sec. 21 of the Stock Corporation Law. More than two-thirds of the stockholders had approved a plan for the recapitalization of the company, under which petitioner claimed his preferential rights were materially altered. Referring to the stockholders' meeting at which the plan was approved, the Supreme Court, Monroe County, said: "Prior to the meeting the corporate capitalization consisted of 10,159 shares outstanding of \$100 par value, 8% cumulative preferred stock and 9,536 shares of common stock having a stated value of \$20 per share. There had been no dividend paid by the corporation since 1930, and there were accrued preferred dividends in arrears in excess of \$900,000. The net value of the corporation's assets over liabilities was approximately \$646,000, leaving a capital deficit of over \$560,000, without taking into consideration the dividends in arrears. The plan proposed was, in brief, the exchange by the preferred stockholders, share for share, of their present holdings of preferred stock for a new prior preferred stock, having a par value of \$25, and with accompanying preferences as to dividends and redemption and liquidating value, together with one share of the existing common stock for each four shares of preferred stock exchanged. The exchange was not compulsory and the common stock to be received in the event of an exchange was not a new issue but would be made up from issued outstanding common stock surrendered by the common stockholders for that purpose. The preferred stock surrendered would be cancelled and the accrued dividends thereon waived." The court observed that it had been previously ruled by the Court of Appeals of New York "that superimposing a new preferred stock

with priorities upon an old preferred stock is not an alteration of the preferential rights of the old stock within the contemplation of subdivision 9, Section 38, of the Stock Corporation Law, where there is no change or alteration of preferences between the existing stock of the corporation. In other words, the alteration, if any, must be as between the preferences of the existing stock in relation to each other and not as between the existing stock and the stock proposed to be issued. In the situation now before the Court, the existing preferences as between the present common and preferred stock are not altered in any respect nor are the holders of the present preferred stock obliged to exchange their stock for the new prior preferred. The exchange is entirely optional with the stockholder." The application for the appointment of appraisers was denied. *Application of Woodruff*, 26 N. Y. S. 2d 679. Everett K. VanAllen of Rochester, for petitioner. Isaac Adler of Rochester, for respondent.

### Pennsylvania.

*Johnson v. Fuller* decision affirmed by Federal Circuit Court of Appeals. The United States Circuit Court of Appeals, Third Circuit, has affirmed the District Court, Eastern District of Pennsylvania, in *Johnson v. Fuller et al.*, 36 F. Supp. 744, (The Corporation Journal, May, 1941, page 393), in holding valid a reorganization plan providing for an optional exchange of preferred stock, on which accumulated dividends were unpaid, for new prior preferred and other securities. *Johnson v. Fuller et al.*, 121 F. 2d 618. Commerce Clearing House Court Decisions Requisition No. 262841.

### Washington.

By-law, disregarded for many years, regarded as waived by corporation. A by-law of respondent corporation provided in part: "No officer of the company shall receive any compensation for his services except the same be first fixed by the board of trustees." The evidence showed, however, that, with one exception, no action in fixing salaries was taken by the board during the period from 1912 to 1935, the salaries being determined by the president who served during these years, and his actions were not questioned. During this period, the president and his son had received additional compensation for certain services, and the company instituted this suit to recover these amounts as "secret profits." The Supreme Court of Washington, concluded from the evidence that this compensation did not constitute a secret profit and was a legitimate salary increase or bonus, for services rendered to the company, which services were of benefit to the company. The court remarked that while a corporation has the power to alter, amend or repeal by-laws adopted by it, it may also waive them, and this it may do expressly or impliedly, and that if it acts or contracts in disregard of a by-law with the consent or acquiescence of the stockholders or members, that is a waiver of the by-laws. The court found a further reason for dismissing the corporation's suit in reach-

ing the conclusion that the action was barred by the statute of limitations. *Bay City Lumber Co. v. Anderson et al.*, 111 P.2d 771. Rummens & Griffin of Seattle, for appellants. L. B. Donley and Gladys Phillips of Aberdeen, for respondent.

## Foreign Corporations

### Arkansas.

Foreign corporation operating in state under contract with Federal Government held liable for penalty for failure to obtain authority to do business. A judgment had been recovered in the lower court against appellant foreign corporation for a \$1,000 penalty for doing business in Arkansas without obtaining authority to do business. The defense was that the activities carried on consisted of the construction of a levee under a contract with the United States. The contract was entered into by the submission of a bid by the appellant, sent from Jackson, Mississippi, to Memphis, Tennessee, followed, after acceptance, by the signing of the contract at Jackson and the mailing of it to Memphis. The Supreme Court of Arkansas ruled that the fact that appellant was working under employment of the Federal Government in Arkansas would not exempt the company from the provisions of the Arkansas statutes requiring qualification of foreign corporations doing business in the state. The court observed that the appellant "was under contract with the government to do a specific job in a certain way, using its own equipment and hiring its own employees, a typical case of independent contractor, and the ordinary relation of employer and employee, master and servant, principal and agent did not exist between it and the government. That it is an independent contractor and is not a government instrumentality there can be no doubt." *E. E. Morgan Co., Inc. v. State for Use and Benefit of Phillips County*,\* 150 S. W. 2d 736. Hall & Hall of Memphis, Tennessee, and Brewer & Cracraft of Helena, for appellant. John L. Anderson and Douglas S. Heslep, of Helena, for appellee. (*Appeal filed in the Supreme Court of the United States, June 19, 1941; Docket No. 190, October 1941 Term.*)

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\*The full text of this opinion is printed in *The Corporation Tax Service*, Arkansas, page 544.

### Connecticut.

Compiling data in state concerning defendant's insurance risks, followed by analysis and formulation of recommendations in another state, held not "doing business." Plaintiff New York corporation sought to recover compensation for services performed for the defendant Connecticut corporation under a contract signed by the plaintiff in New York and forwarded by mail to the defendant and signed by it at New Haven. The fact that plaintiff was not licensed as a foreign corporation was pleaded as a defense by the defendant, thus raising the question as to whether plaintiff was "doing business" in Connecticut.

It had no office or place of business there and maintained no agents, solicitors or employees in the state. Under the contract, plaintiff sent a representative to New Haven to inspect defendant's plant. He acquired data concerning risks to which defendant might be liable resulting from its ownership of property, employment of help and the conduct of its business and from any other cause subjecting it to any risk, together with information concerning its insurance policies. This data was taken to plaintiff's New York office, where it was analyzed and a report with recommendations as to insurance coverage sent to defendant, for which a charge was made. The Superior Court, New Haven County, overruled defendant's plea, regarding plaintiff as not carrying on business in Connecticut under the circumstances. It concluded that the activity carried on in Connecticut was nothing more than a search for information, noting that its analysis and the formulation of recommendations were effected in New York. "This search for information," said the court, "does not constitute the transaction of business in this state within the intention of the term as used in our statutes." *Surveyors, Inc. v. Berger Brothers Co.*,\* 9 Conn. Sup. 176. CCH Court Decisions Requisition No. 261796.

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\* The full text of this opinion is printed in **The Corporation Tax Service**, Connecticut, page 137.

#### Illinois.

**Service upon employe of foreign corporation in charge of corporation's exhibit at coin machine show set aside.** Service of process in a Federal court action was made upon defendant New York corporation by serving an employe in charge of an exhibit of the company at a "Coin Machine Show" held in a Chicago hotel, in which the employe occupied three rooms, one being devoted to demonstrations of defendant's machines, another being used as a conference room and the third as an office. Two machines of defendant were exhibited at the show. All distributor and rental agreements taken by the employe were forwarded to New York City for further action. Under these circumstances, the United States District, Northern District of Illinois, held that the defendant was not doing business in the District and dismissed the suit. *Phonovision Corp. v. Phono-Films Distributing Co.*,\* United States District Court, Northern District of Illinois, April 18, 1941. Commerce Clearing House Court Decisions Requisition No. 257537. McCaleb, Wendt & Miller, of Chicago, for plaintiff. Miller, Gorham, Wescott & Adams, of Chicago, for defendant.

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\* The full text of this opinion is printed in **The Corporation Tax Service**, Illinois, page 510.

#### Louisiana.

**Corporation, represented in state by manufacturers' agent who also served others in that capacity, held not doing business.** In an action by an unlicensed foreign corporation to recover the value of material consigned to one of the defendants at a time when he acted as Louisiana

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selling agent for the company, a defense was that the corporation could not use the state courts because it was not authorized to do business and had failed to pay annual taxes required of a licensed corporation. The Court of Appeal, Parish of Orleans, ruled as follows: "In order for the plaintiff to come within the ban of the statute, it is, of course, necessary that it be 'doing business in this state.' *R. J. Brown Company v. Grosjean*, 189 La. 778, 180 So. 634. Handlin acted as the plaintiff's agent for the purpose of selling its pumps. He also represented other parties as a sort of manufacturer's agent. He was nothing more than a solicitor for orders which, when accepted at the home office of the plaintiff corporation in Cincinnati, Ohio, were filled by shipment from that State. Such a transaction does not constitute doing business in the State of Louisiana." *National Pumps Corporation v. H. J. Bruning et al.*,\* Court of Appeal, Parish of Orleans, Louisiana, April 7, 1941. Commerce Clearing House Court Decisions Requisition No. 257283. Theo Cotonio, for appellees. Deutsch & Kerrigan and Lehman K. Preis, for appellant.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Louisiana, page 519.

#### New York.

Business activity of subsidiary held no basis for upholding service of process upon parent company, not active in state, where separate entities were preserved. Service of process was made upon the president of defendant corporation, while in New York City. The United States District Court, Southern District of New York, to which the action was removed, found that the defendant had not done business in New York for fourteen years. A subsidiary of defendant was licensed to do business in New York. Plaintiff contended "that even if defendant does its business in New York through a wholly owned subsidiary, the said subsidiary is completely dominated by defendant and acts as a mere 'agent, dummy or decoy' for defendant." The court found, however, that "the separate entities of defendant and its affiliate corporation have been preserved even in the agreements sued upon herein." A motion to set the service aside was granted. *American Fire Prevention Bureau, Inc. v. Automatic Sprinkler Co. of America*,\* United States District Court, Southern District of New York, April 24, 1941. Commerce Clearing House Court Decisions Requisition No. 258318. Beals & Nicholson, (Wilber W. Chambers and John D. Beals, Jr., of counsel), of New York City, for plaintiff. Whitman, Ransom, Coulson & Goetz (Colley E. Williams and Forbes D. Shaw, of counsel), of New York City, for defendant.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, New York, page 20,475.

Statute denying use of courts in contract actions to unlicensed foreign corporations held to apply only where contract sued upon was

**made in state.** Referring to section 218 of the General Corporation Law which provides that "a foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority," the New York Supreme Court, Appellate Division, Second Department, observed: "A bare statement in the answer and repeated in the affidavit that the contract was made in New York, unsupported by any evidentiary facts, creates no issue of fact in face of the particulars furnished by the plaintiff as to the making of the contract. Unless the contract was made in this State, section 218 of the General Corporation Law has no application." *Bertolf Bros., Inc. v. Leuthardt*,\* 26 N. Y. S. 2d 114. Max Taylor of New York City, for plaintiff. Wm. C. Young of Port Chester, for respondent.

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\*The full text of this opinion is printed in **The Corporation Tax Service**, New York, page 20,479.

### Ohio.

**Corporation selling a service, including right to use advertising devices over a period but retaining title to them, held doing business and required to be qualified.** Plaintiff, an unlicensed foreign corporation, agreed to send defendant 52 mats and copy for advertising and granted defendant the right to use these mats and the copy exclusively for one year in an Ohio city. In affirming a judgment to the effect that plaintiff was doing business in Ohio under Section 8625-25, General Code, the Court of Appeals, Erie County, said: "Clearly, this was not the sale of a commodity; it was the sale of the right to use certain articles and the service of advertising copy prepared by plaintiffs. The title to the articles remained in the plaintiff, and thereby it continued to have an interest in the property as it served defendant in its business in Ohio." The court concluded that in selling a service—an advertising service—to defendant, plaintiff was "doing business." *Clare & Foster, Inc. v. Diamond S. Electric Co.*, 34 N. E. 2d 284. H. L. Peeke of Sandusky, for appellant. Flynn, Frohman, Buckingham, Py & Kruse of Sandusky, for appellee.

### South Carolina.

**Service upon adjuster, acting for defendant corporation, upheld.** Plaintiff purchased an automobile from a South Carolina dealer which had been manufactured by defendant corporation. This suit was brought to recover damages for breach of warranty. Prior to the institution of the suit, plaintiff wrote to defendant at New York City regarding alleged defects in the car and defendant arranged to have an agent of its sales corporation, with an office at Atlanta, Georgia, call on plaintiff to adjust the matter. Service of process was made upon this adjuster while in South Carolina, conferring with plaintiff. A default judgment resulted and defendant appealed specially to vacate the judgment. The Supreme Court of South Carolina ruled

that service was made upon a proper "agent" of defendant under the statute providing for service on foreign corporations, Sec. 434, 1932 Code, and that such service gave jurisdiction of the courts of the state over defendant, as it was "doing business" there. *Jones v. General Motors Corporation*, 14 S. E. 2d 628. Haynsworth & Haynsworth of Greenville, for appellant. W. E. Bowen of Greenville, for respondent.

## Taxation

### Alabama.

Corporation operating as subcontractor within Federal area ruled not subject to contractors' license tax under provisions in effect prior to 1940. The case involved the power of the state to levy and collect a contractor's license on a contractor holding a subcontract for certain features of the improvements erected as a veterans' hospital by the United States on land which it acquired by purchase in 1938. After referring to the pertinent law (sections 1505, 1506, Code of 1923, and Article 1, Section 8, clause 17, Constitution of the United States), the Supreme Court of Alabama said: "We have here a situation where the Government has exclusive jurisdiction by the consent of this State over the territory on which the construction work was done, except for the service of process issued out of the courts of the State, since there is nothing to indicate that its acceptance was short of exclusive jurisdiction. Wherever that jurisdiction exists the State has no authority to levy a tax on the privilege of doing business in such territory." In passing upon the further question as to whether certain acts of the appellant company, when considered together, would show the appellant was doing business as a contractor off the reservation, the court ruled against such liability where these activities consisted of (1) the purchasing and taking of delivery of tools and supplies off the reservation; (2) the fact that employes working on the reservation lived in the state outside the reservation; (3) the ordering of materials by telephone from within the reservation and their delivery therein from points outside and (4) the payment of employes by money received from the cashing of a check at a bank outside the reservation. *O'Pry Heating & Plumbing Co. v. State of Alabama*,\* 3 So. 2d 316. Commerce Clearing House Court Decisions Requisition No. 262199. Ball & Ball of Montgomery, for appellant. Thos. S. Lawson, Atty. Gen., and John W. Lapsley and J. Edw. Thornton, Asst. Attys. Gen., for appellee. (Note: In its opinion, the court observed: "The changes made in the Code of 1940 have no application (see, Title 59, section 19, Code of 1940).") It is to be noted that section 19 contains a provision not found in the earlier Codes, reserving to the state, among other tax powers, where jurisdiction is ceded to the United States, "the right to tax the exercise by any person, firm, corporation or association of any and all rights, privileges, and franchises upon said lands.")

\* The full text of this opinion is printed in *The Corporation Tax Service*, Alabama, page 3837.

**Arkansas.**

**Change in corporation income tax rates held not retroactive.** The Arkansas Supreme Court has ruled that the change in the income tax rate on corporations from a flat 2% rate to graduated rates brought about by Act No. 129, Laws of 1941, effective March 11, 1941, is not applicable to income earned during 1940. *Hardin v. Fort Smith Couch & Bedding Co. et al.*,\* Arkansas Supreme Court, July 7, 1941. Commerce Clearing House Court Decisions Requisition No. 263563. Jack Holt, Attorney General, Elsi Jane Trimble and Leffel Gentry of Little Rock, for appellant. Daily & Woods of Fort Smith; Rowell, Rowell & Dickey of Pine Bluff; Brickhouse & Brickhouse and E. Chas. Eichenbaum of Little Rock; McClellan & Gaughan of Camden; Rose, Loughborough, Dobyns & House of Little Rock, for appellees.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Arkansas, page 1518.

**Michigan.**

**Foreign corporation merely obtaining orders in state, filled by delivery of goods to interstate carrier in another state for shipment to customers in state, ruled engaged in interstate commerce and not subject to use tax.** The Supreme Court of Michigan has affirmed the ruling of the Circuit Court of Wayne County of December 12, 1939, in *J. B. Simpson, Inc. v. Gundry et al.*, (The Corporation Journal, March, 1940), to the effect that the Michigan use tax would not apply under circumstances where the plaintiff company operated a merchant tailoring establishment in Chicago, Illinois, took orders in Michigan from residents for clothes and filled such orders in Chicago and, upon delivery there to an interstate carrier, title was vested, by agreement in the purchaser. The court regarded such activities as interstate commerce upon which the burden of a tax such as the use tax could not be imposed. *J. B. Simpson, Inc. v. Gundry et al.*,\* 298 N. W. 81. Commerce Clearing House Court Decisions Requisition No. 259893. Thomas Read, Attorney General, and Edmund E. Shepherd, Gaylord V. Bebout and T. Carl Holbrook, Asst. Attys. General, of Lansing, for appellant. Butzel, Levin & Winston of Detroit, for appellee.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Michigan, page 6434.

**New York.**

**New York corporation held not subject to franchise taxes after its dissolution by proclamation.** Plaintiffs were officers and the sole stockholders of a business corporation which had been dissolved on December 16, 1929, by proclamation of the Secretary of State, for non-payment of franchise taxes. Unaware of this dissolution, plaintiffs had continued to operate the business until 1934 in exactly the same

manner as they had before dissolution. "The question here," said the New York Supreme Court, Appellate Division, Second Department, "is whether the owners of the business, by continuing to operate it as a corporation after the dissolution, subjected it to taxation under Article 9A." The court concluded that "it must be held that the defendant may not levy a franchise tax on the plaintiffs' business for the period subsequent to the dissolution of the corporation. The tax is one upon the privilege granted by the state for the lawful exercise of the corporate franchise, not a penalty for the unlawful usurpation of a privilege that has been withdrawn. When the state dissolved the corporation it terminated the right to tax the franchise thus ended." *Brady et al. v. Tax Commission*,\* 29 N. Y. S. 2d 88. George Dyson Friou of New York City, for plaintiffs. John J. Bennett, Jr., Atty. Gen., by Oscar S. Mann, Asst. Atty. Gen., for the State. Commerce Clearing House Court Decision Requisition No. 261809.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, New York, page 20,505.

#### Utah.

- **Utah retailer held subject to collect Utah use tax on mail order business conducted from out of state with Utah customers.** "The narrow issue presented in this case, as posed by plaintiff company in its brief," said the Supreme Court of Utah, "is whether a retailer who does business within this state can constitutionally be required to collect a use tax in connection with its mail order business conducted wholly from outside the state with customers within the state." A decision of the Tax Commission holding the company liable to collect the use tax was affirmed, the court following the rule laid down by the Supreme Court of the United States that a liability existed under similar circumstances in the cases of *Nelson v. Sears, Roebuck & Co.*, 61 S. Ct. 586, and *Nelson v. Montgomery Ward & Co.*, 61 S. Ct. 593. *Montgomery Ward & Co. v. State Tax Commission*,\* 112 P. 2d 152. George A. Critchlow of Salt Lake City and H. W. Bancroft and Stuart S. Ball, of Chicago, Ill., for plaintiff. Grant A. Brown and Alvin I. Smith of Salt Lake City, for defendant.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Utah, page 7778.



## Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.\*

### October Term 1941

ARKANSAS. Docket No. 190. *E. E. Morgan Co., Inc. v. State for Use and Benefit of Phillips County*, 150 S. W. 2d 736. (The Corporation Journal, October, 1941, page 10.) Liability of unlicensed foreign corporation to penalty for failure to obtain authority to do business where operating under contract with Federal government. Appeal filed, June 19, 1941.

### October Term 1940

DELAWARE. Docket No. 741. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 115 F. 2d 268. (The Corporation Journal, April, 1941, page 366.) Appeal filed, February 3, 1941. Certiorari granted, limited to the first question presented by the petition, March 3, 1941. (The "first question" is: "Whether a provision of the New York Civil Practice Act regarding monetary interest is applicable to an action in the Federal District Court for Delaware?") Argued, May 1 and 2, 1941. Judgment reversed and case remanded for decision in conformity with the laws of Delaware, June 2, 1941. (See page 6.)

INDIANA. Docket No. 655. *Ingram-Richardson Mfg. Co. of Indiana, Inc. v. Department of Treasury*, 114 F. 2d 889. Indiana Gross Income Tax Act—receipts from processing—interstate transportation preceding and following processing. Appeal filed, December 27, 1940. Certiorari granted, February 3, 1941. Argued, April 1, 1941. Judgment reversed, May 5, 1941. (The Corporation Journal, June, 1941, page 419.) Rehearing denied, June 2, 1941.

\* Data compiled from CCH U. S. Supreme Court Service, 1941-1942.



## Regulations and Rulings

**DISTRICT OF COLUMBIA**—Income from orders resulting from submission of bids on Government business is not income from District of Columbia sources, when no personal solicitation within the District occurred with respect to any of the orders. (Opinion of Corporation Counsel, District of Columbia CT (Corporation Tax) Service, ¶ 19-075.)

**IOWA**—Iowa real property taxes accrue for Federal income tax purposes in September, when they are levied by the board of supervisors and when the amount of the tax is finally determined. (Ruling of Bureau of Internal Revenue, Iowa CT, ¶ 2448.)

**MICHIGAN**—Filing fees paid by corporations for filing, examining and certifying articles of incorporation constitute capital expenditures and are not deductible from gross income for Federal income tax purposes, while franchise fees to be paid upon incorporation of Michigan corporations, or upon application for admission by foreign corporations are deductible from gross income as taxes under section 23 (c) of the Internal Revenue Code. (I. T. 3468, 1941-16-10684 (p. 2).) (Michigan CT, ¶ .403.)

**NORTH CAROLINA**—The Attorney General has ruled that a corporation purchasing its own bonds for less than the issued price receives thereby taxable income to the extent of the difference between the issuing price and the purchase price. (North Carolina CT, ¶ 15-148.)

**TENNESSEE**—Excess profits taxes paid to the Federal Government should be allowed as a deduction in ascertaining the net income of a corporation in computing its excise tax. (Opinion, Attorney General to Commissioner of Finance and Taxation, Tennessee CT, ¶ 14-513.)

**TEXAS**—Ten per cent of each class of no par value stock must be paid in before approval of a corporate charter by the Secretary of State. (Opinion, Attorney General, Texas CT, ¶ .425.)

**UTAH**—In an opinion to the Secretary of State, the Attorney General has ruled that a foreign corporation, operating under a contract with the Federal Government in the sale and construction of certain equipment upon an air field or base located in Utah, is doing business to such an extent that it must qualify in the state. (Utah CT, ¶ .410.)

The Attorney General of Utah has indicated that the State of Utah may require the obtaining of a contractor's license by any contractor, domestic or foreign, who may be engaged in work upon property owned by the Federal Government, even though such work is done entirely under a contract with the Federal Government. (Opinion to the Director of the Department of Registration, Utah, ¶ 7897.)

**WISCONSIN**—The Commissioner of Taxation has issued a rule relating to the reporting of a "constructive" dividend under the Privilege Dividend Tax requirements, indicating that the report and payment of the tax in that connection are to be made on or before the fifteenth day of the third month following the close of the income year. A "constructive" dividend is defined to "include the transfer of all or any part of the annual income of a corporation to its stockholders by any means other than the regular declaration and payment of a dividend." (Wisconsin CT, ¶ 19-058.)

## Some Important Matters for October and November

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

**CALIFORNIA**—Quarterly Retail Sales Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

**GEORGIA**—Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporations.

**INDIANA**—Quarterly Gross Income Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

**IOWA**—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

**LOUISIANA**—Franchise Tax Report and Tax due on or before October 1.—Domestic and Foreign Corporations.

**MASSACHUSETTS**—Second instalment of Excise Tax due on or before October 20.—Domestic and Foreign Corporations.

**NEW YORK**—Second instalment of Income Tax of Business Corporations due on or before November 15.—Domestic and Foreign Business Corporations other than real estate and holding companies.

Supplementary Franchise Tax Return (Form 60 CT) due on or before November 30.—Domestic and Foreign Corporations organized or qualified between May 15 and November 1 of current year.

**NORTH DAKOTA**—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

**RHODE ISLAND**—Semi-Annual Report to Department of Labor during October and April.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

**WEST VIRGINIA**—Quarterly Gross Income Tax Return and Payment due on or before October 30.—Domestic and Foreign Corporations.



# The Corporation Trust Company's Supplementary Literature

*In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York, N. Y.*

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**Amendments to Delaware Corporation Law, 1941.** Contains complete text of the amendments adopted at the 1941 session of the legislature, giving for each one a brief explanation of its purpose and effect.

**Spot Stocks—and Interstate Commerce.** Treats, in a general and informal way, of the relation between the carrying of goods in warehouses in outside states and the statutory obligations which that activity, in some states, places on the corporation owning the goods.

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**When a Corporation Leaves Home.** A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

**We've Always Got Along This Way.** This is a 24-page pamphlet giving brief digests of cases in various states in which corporation officials who had thought they were getting along very well with statutory representation by a business employee suddenly found themselves penalized in unusual and often embarrassing ways: such as one company that had to pay its employee-representative's alimony.

**What! We Need a Transfer Agent? Nonsense!** The foregoing is the title of a pamphlet which describes in detail, with many illustrations, the exact steps through which a stock certificate goes in being transferred from one owner to another by an experienced transfer agent—purpose being to enable any corporation official to judge more accurately whether or not his own company should use the services of a transfer agent.

**Judgment by Default.** Gives the gist of Michigan Supreme Court case of *Rarden v. Baker* and similar cases in other states, showing how corporations qualified as foreign in any states and utilizing their business employees as statutory representatives are sometimes left defenseless in personal damage and other suits.

**A Corporation's Achilles Heel.** Containing the complete text of the opinion of the Supreme Court of the United States in *State of Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, State of Washington*, of the Supreme Court of New Mexico in *Silva v. Crombie & Co.*, and of the Supreme Court of Michigan in *Rarden v. R. D. Baker Co.*—three decisions of great significance to attorneys of corporations qualified in one or more states.

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